

**IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA**

**Cr. Revision No. 67 of 2007.**

**Date of Decision: 24<sup>th</sup> August, 2007.**

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| Desh Raj and others | .. Petitioners |
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Versus

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| Meena | .. Respondent. |
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**Coram**

**The Hon'ble Mr. Justice V.K. Gupta, Chief Justice.**

Whether approved for reporting?<sup>1</sup>

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| <b><u>For the petitioners:</u></b> | Mr. J.R. Poswal, Advocate. |
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| <b><u>For the respondent:</u></b> | M/s. Rajinder Thakur and Jagan Nath,<br>Advocates. |
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**V.K. Gupta, CJ (Oral)**

This petition is converted into and treated as a petition under Section 482 of the Code of Criminal Procedure for setting aside the order dated 16<sup>th</sup> April, 2007 passed by the learned Additional Chief Judicial Magistrate, Sundernagar and the proceedings in Criminal Complaint Meena versus Desh Raj and others pending in the aforesaid Court, from out of which the aforesaid impugned order dated 16<sup>th</sup> April, 2007 arose.

Respondent Meena, claiming to be the legally wedded wife of petitioner No.1 Desh Raj, filed a Criminal Complaint under Sections 406 and 506 of the Indian Penal Code against the six petitioners herein. The complaint being very short, for ready reference as well as for the sake of record, it is being reproduced herein below. The entire text of this complaint reads thus:-

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<sup>1</sup> Whether the reporters of Local Papers may be allowed to see the judgment?

- “1. That the complainant is legally wedded wife of accused No.1 and their marriage took place on 10.9.2001 according to Hindu Rites and ceremonies.
2. That after sometime of marriage the accused persons started maltreating the complainant and also gave her merciless beatings and finally compelled her to leave his house in the year 2003 and since then the complainant is residing her parents house at Ambedkar Nagar Bhojpur, Tehsil Sundernagar. At the time of leaving the accused the complainant was not allowed by the accused persons to take her articles i.e. Stri Dhan with her to her parents house and the same are in the custody of accused.
3. That at the time of marriage of complainant was given Stri Dhan by her or relatives and friends and the same is in the custody of accused persons and they are utilizing the same for their own enjoyment.
4. That the complainant when demanded the said articles, then the accused persons gave threatening to kill her and her parents. The following is the list of articles/ Stri Dhan of the complainant. List of the articles of Stri Dhan is attached herewith.
5. That the marriage was solemnized from the house of parents of complainant at Ambedkar Nagar Bhojpur and the Stri Dhan was also given from this place hence this Ld. Court has got jurisdiction to try and entertain the present complaint.”

Record of the trial Court, carefully perused by me, suggests that this complaint was presented in the Court below on 9<sup>th</sup> April, 2007. The Criminal Ahlmad of the Court submitted his report to the following effect:-

“This is a complaint U/S 406, 506 IPC filed by complainant through Sh. R.K. Sharma Advocate. P.A. & P.F. filed and duly stamped. List of documents filed and documents filed as per list. One spare copy of complaint also filed.”

On 16<sup>th</sup> April, 2007 the learned Presiding Officer passed the order which is under challenge in this petition. It is by virtue of the impugned order that the cognizance was taken and process was issued against the petitioners, who are named as accused persons, in the aforesaid complaint.

Neither the statement of the complainant nor of any witness was recorded by the learned Magistrate before taking cognizance of the complaint and before issuing process against the petitioners.

Section 200 of the Code of Criminal Procedure reads thus:-

**“200 Examination of complainant:-** A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made a complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.”

A bare perusal of Section 200 (supra) should leave no one in any manner of doubt that it is incumbent as well as obligatory upon a Magistrate taking cognizance of an offence on complaint to examine upon oath the complainant and such other witnesses as are produced by the complainant at the stage of taking cognizance of the complaint by the

Magistrate. The expression, “shall examine upon oath the complainant.....” is a clear manifestation of the Legislative intent that for the Magistrate proposing to take cognizance of the offence on complaint, there is no option but to record on oath the statement of the complainant. Whether, after recording on oath statement of the complainant, statements of the witnesses on behalf of the complainant have also to be recorded or not is a matter of exercise of the judicial discretion by the Magistrate and would depend upon individual facts of each and every case. In some cases, after recording the statement of the complainant on oath the Magistrate may feel convinced and prima facie satisfied that there is no need to record the statements of witnesses and that the statement of the complainant by itself is sufficient to enable the Magistrate to take cognizance of the offence on complaint and to issue process against the accused. In other cases, however, the Magistrate may insist upon examining on oath the witnesses also, in addition to the examination of the complainant so as to find supporting and corroboratory evidence to prima facie satisfy and convince himself that there is a warrant for issuing process against the accused upon and after his taking cognizance of the offence. Having said that, I must hasten to add that under normal circumstances the Magistrate must insist upon the production of one or more witnesses, in addition to the complainant, for being examined on oath and it is in rare cases where the sole statement of the complainant by itself, without the production of any witness should be considered sufficient for taking cognizance of the offence and for issuing process against the accused. Examination of one or more witnesses, in addition to the examination of the complainant always helps the Magistrate in finding supporting as well as corroboratory evidence which would satisfy him about the prima-facie nature of the case to enable him to take cognizance of the offence and to issue process against the accused.

Be that as it may, the fact remains that at least the examination of the complainant on oath is a binding as well as a mandatory requirement of law and without doing so, it is not open to a Magistrate to take cognizance of an offence on complaint and then to issue process against the accused persons.

As the facts in the present complaint would disclose, the examination of the complainant as well as the examination of the witnesses on her behalf was all the more important as well as desirable and required in the present case in view of the nature of the allegations levelled by the complainant against the petitioners. The mere ipse-dixit of the complainant in the complaint could not be a substitute for her examination on oath. Based on such mere ipse-dixit the Magistrate in any case ought not have exercised his discretion in taking cognizance of the offence and issuing process against the petitioners. The learned Magistrate therefore clearly misdirected himself as well as violated the binding and mandatory requirement of law as contained in Section 200 of the Code of Criminal Procedure by taking cognizance of the offence and ordering the issuance of process against the petitioners. On this ground alone the impugned order deserves to be set-aside.

Irrespective of the aforesaid patent illegality committed by the Magistrate in adopting the aforesaid procedure for taking cognizance of the offence, the proceedings in the complaint deserve to be quashed also on the ground of the fact that a bare reading of the complaint does not disclose the commission of any offence.

I have reproduced the text of the complaint in the earlier part of this judgment which by itself shows, on the very face of it that no offence appears to have been committed by the petitioners. As each and every para of the complaint would show, it totally lacks in material particulars and does not aver or state any fact which would constitute gravamen of any

offence punishable either under Section 406 or Section 506 of the Indian Penal Code. No dates have been given. No instances have been mentioned. There is no mention of any relationship of any individual accused with the commission of any act by any such accused nor is there any mention as to how and in what manner was any offence committed by any accused (or all accused persons together). Since the complaint is under Section 406 and 506 of the Indian Penal Code, referring to Section 406 read with Section 405, the complaint does not mention any fact as to the entrustment of the property to any particular accused or how and in what manner was any such entrusted property dishonestly misappropriated or converted to his own use by any accused (or all the accused persons). Similarly, coming to Section 506 read with Section 503 of the Indian Penal Code, the complaint does not disclose as to which accused threatened the complainant, when and where, with any injury to her person etc. etc.

Upon and after a bare reading of the complaint in this case, the Magistrate ought to have thrown out the complaint at the very threshold, and refused to take cognizance of the offences for the aforesaid total lack of material particulars with respect to factual aspects, constituting the gravamen of any offence, either under Section 406 or 506 of the Indian Penal Code.

On both counts the learned Magistrate clearly misdirected himself and either on account of total non-application of mind or as a result of his misdirection he passed the impugned order resulting in a grave miscarriage of justice.

The impugned order accordingly is set aside. The proceedings in the aforesaid complaint are also quashed with all consequences.

A copy of this judgment shall be sent to the Magistrate for his comments and thereafter the matter shall be dealt with on the

administrative side in so far as the initiation of any action against the Magistrate is concerned.

The petition is allowed with all consequences.

**Cr.M.P. No. 242 of 2007.**

In view of the order passed in the main petition, this application is also disposed of.

August 24, 2007.  
(rc)

**(V.K. Gupta), C.J.**